STATE OF MICHIGAN

COURT OF APPEALS

BETH ROSE,

Plaintiff-Appellant,

v

SHATZMAN & ASSOCIATES, P.C., SHATZMAN & ASSOCIATES, L.L.C., and JERALD SHATZMAN,

Defendants-Appellees.

UNPUBLISHED
March 30, 1999

No. 204346
Oakland Circuit Court
LC No. 96-520000 NZ

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of Jerald Shatzman and his law firm (hereinafter defendant). We affirm in part, reverse in part and remand for further proceedings in accordance with this opinion.

This case arises out of plaintiff's employment as defendant's legal secretary. Plaintiff's suit against defendant alleged civil rights claims premised on the theories of hostile work environment sexual harassment, quid pro quo sexual harassment and retaliation. The trial court granted summary disposition of all three claims on the ground that plaintiff had failed to establish one of the elements of the requisite prima facie case for each claim.

On appeal, a trial court's order granting or denying summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10)[1] tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Summary disposition pursuant to this subrule is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); see also *Radtke, supra*. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing the motion, a court must consider all of the documentary evidence in a light most favorable to the nonmoving party. *Radtke, supra*.

Plaintiff first argues that the trial court erred in granting summary disposition of her sexual harassment claims.

The Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., prohibits discrimination in employment because of sex. MCL 37.2202; MSA 3.548(202). The ELCRA defines "[d]iscrimination because of sex" to include "sexual harassment." MCL 37.2103(i); MSA 3.548(103)(i). "Sexual harassment" is defined to mean

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> (i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
>
> (ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment . . . .
>
> (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(i)(i)(ii), (iii); MSA 3.548(103)(i)(i)(ii) and (iii).]

Sexual harassment claims premised on either § 103(i)(i)[2] or § 103(i)(ii) are generally known as quid pro quo claims. *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996). Sexual harassment claims premised on § 103(i)(iii) are generally known as hostile work environment claims. *Radtke, supra* at 381.

We first consider plaintiff's argument that the trial court erred in granting summary disposition of her hostile work environment claim. As explained in *Radtke, supra* at 382-383:

> [T]here are five necessary elements to establish a prima facie case of a hostile work environment:
>
> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;

(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior.

In this case, the trial court found that plaintiff had satisfied the first, second, third and fifth elements of a prima facie case for a claim of hostile work environment. However, the trial court granted summary disposition of plaintiff's hostile work environment claim on the ground that she had failed to create a question of fact concerning the fourth element. Specifically, the court found that "the incidents of harassment were not sufficiently severe or pervasive enough to be actionable." On appeal, plaintiff contends that the documentary evidence in this case created a question of fact concerning the fourth element of her prima facie case.

Whether a hostile work environment existed is determined by a reasonable person standard, i.e., "whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke, supra* at 394. The sexually harassing conduct must have been severe or pervasive. *Chambers v Trettco, Inc*, 232 Mich App 560, 563; ___ NW2d ___ (1998).

In this case, plaintiff contends that defendant subjected her to daily sexual comments, gestures, and ridicule. Plaintiff testified that defendant regularly received pornographic materials at the office and openly compared plaintiff to the models in the materials in front of others. In addition, defendant continually subjected plaintiff to sexual innuendoes and made comments regarding other women's bodies. Plaintiff testified that defendant would flash $100 bills in front of her and on one occasion he asked her what she was willing to do for one. Defendant admitted to engaging in casual bantering with plaintiff about their personal lives. Another office worker testified at the MESC hearing that plaintiff frequently cried while at work due to defendant's harassment. Fellow office workers heard defendant ask plaintiff if she got any last night or who she slept with. If plaintiff went out for lunch, defendant would ask her if she got a quickie. Plaintiff asserts that defendant's harassment forced her to seek professional counseling in order to handle the stress of the situation. Viewing this evidence in a light most favorable to plaintiff, we conclude that a question of fact exists concerning whether defendant's sexual conduct was so severe or pervasive that it substantially interfered with plaintiff's employment or created an intimidating, hostile or offensive work environment. *Radtke, supra* at 382; *Chambers, supra* at 563-564. Accordingly, the trial court erred in granting summary disposition of plaintiff's hostile work environment claim.

Next, plaintiff contends that the trial court erred in granting summary disposition of her quid pro quo claim.

As explained in *Champion, supra* at 708, a party pursuing a quid pro quo claim premised on § 103(i)(ii) of the ELCRA

> must establish two things: (1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment.

As evidence of quid pro quo sexual harassment, plaintiff cites in her brief on appeal her deposition in which she testified that defendant habitually came up to her desk and pulled out a money clip containing $100 bills. Plaintiff testified that one time she told defendant that she "could use 100," and that defendant replied "I got more than one. What are you going to do for it, Beth?" Although this testimony arguably satisfies the first element noted in *Champion*, plaintiff cites no evidence and does not argue that defendant used her reaction to this conduct "as a factor affecting her employment." More specifically, plaintiff never accepted defendant's alleged sexual invitations and she never suffered any negative consequences based on her decision. Plaintiff did not allege that she was terminated for failing to accept defendant's $100 invitation or that after she refused defendant's sexual invitation that his harassment became worse. Because plaintiff failed to allege that she forfeited job benefits or was otherwise subjected to less favorable working conditions based on her rejection of defendant's alleged sexual invitation, we conclude that the trial court properly granted summary disposition of plaintiff's quid pro quo sexual harassment claim.

Finally, plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition with regard to her claim of retaliation.

"To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

In this case, plaintiff testified that during the first week of December, 1994, she complained to Robert Pilcowitz, an attorney who was apparently leasing office space from defendant, about defendant's sexually harassing behavior. Plaintiff testified that during the first part of January, 1995, she met with defendant and Pilcowitz and that defendant proposed reducing her salary by a significant amount (at least a couple thousand dollars) and paying her for overtime.[3] Plaintiff testified that she did not agree to the proposal and that she requested an opportunity to look for other employment. Plaintiff testified that the three of them agreed that she would have until March to seek other employment. Defendant subsequently terminated plaintiff on January 31, 1995.

Plaintiff's theory is that defendant retaliated against her because she complained to Pilcowitz. The trial court granted summary disposition of plaintiff's retaliation claim on the ground that plaintiff failed to establish the causal connection element of her prima facie case. Specifically, the trial court found that plaintiff had failed to establish that her complaints to Pilcowitz were causally related to defendant's discharge of plaintiff in light of Pilcowitz's affidavit that he never told defendant about plaintiff's complaints. However, "[i]n cases involving questions of . . . credibility . . ., summary judgment is hardly ever appropriate." *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App

738, 744-745; 419 NW2d 746 (1988). Moreover, [i]t is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted." *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Accordingly, because a genuine issue exists concerning the credibility of Pilcowitz's assertion that he never told defendant about plaintiff's complaints, we conclude that the trial court erred in granting summary disposition on the ground that plaintiff had failed to establish the causal connection element of her prima facie case.

In summary, we affirm the grant of summary disposition with respect to plaintiff's claim of quid pro quo sexual harassment. We reverse the grant of summary disposition with respect to plaintiff's claims of hostile work environment sexual harassment and retaliation and remand for further proceedings.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

[1] In giving his bench opinion, the trial court indicated that it was granting summary disposition of at least one of plaintiff's claims pursuant to MCR 2.116(C)(8) (failure to state a claim). However, because it is clear that the trial court considered documentary evidence outside the pleadings in granting summary disposition of all three of plaintiff's claims, we treat the motion as having been granted pursuant to MCR 2.116(C)(10) with respect to all claims.

[2] Plaintiff has not alleged that submission to sexual harassment was made a term or condition to obtain her employment with defendant in this case. Thus, a quid pro quo claim premised on § 103(i)(i) is not at issue in this case.

[3] Defendant's affidavit indicates that the meeting in which he proposed reducing plaintiff's salary occurred approximately December 1, 1994. However, defendant concedes that plaintiff's recollection concerning the timing of this event is different than his.